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No. 88-1278

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CONSOLIDATED TELEVISION CABLE SERVICE, INC. - - - - - Petitioner

versus

THE CITY OF FRANKFORT, KENTUCKY, ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY and COMMUNITY SERVICE, INC. - - Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FROM RESPONDENT ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY

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RESTATEMENT OF QUESTIONS PRESENTED

1. Does state action immunity shield municipal actors from antitrust attack where such entities have acted pursuant to a "clearly articulated and affirmatively expressed state policy" to displace competition with monopoly public service?

2. Under Kentucky Constitutional and statutory provisions, are the respondents municipal actors whose manner of providing CATV services to residents of Frankfort is a reasonably foreseeable exercise of delegated powers thus shielding respondents from antitrust allegations?

3. Are petitioner's constitutional claims under 42 U.S.C. § 1983 barred by res judicata under prior state and federal decisions where such claims might have been asserted but were not asserted in such earlier actions?

LIST OF PARTIES

The named parties are the only parties to this litigation. Respondent, Electric and Water Plant Board of the City of Frankfort, Kentucky, is a municipal instrumentality existing under the provisions of KRS 96.172 through 96.188 inclusive, and has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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CONSOLIDATED TELEVISION CABLE SERVICE, INC. - - - - - *Petitioner*

v.

THE CITY OF FRANKFORT, KENTUCKY, ELECTRIC AND WATER PLANT BOARD OF CITY OF FRANKFORT, KENTUCKY, AND COMMUNITY SERVICE, INC. - - - *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FROM RESPONDENT ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY

Respondent, Electric and Water Plant Board of the City of Frankfort, Kentucky ("Plant Board") respectfully prays for denial of the writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered September 21, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 857 F. 2d 354 and appears as Appendix A to the petition. The memorandum opinion of the United States District Court for the Eastern District of Kentucky is not reported but appears as Appendix B to the petition.

STATUTES INVOLVED

Kentucky Constitution §164 as well as §163 is involved.

STATEMENT OF THE CASE

We adopt the statement of facts contained in the opinions of the Sixth Circuit and the District Court with the addition of pertinent history of Frankfort's special situation.

In 1943, in furtherance of consumer interest, the City acquired the electric and water facilities serving Frankfort and environs in order to bring low cost nonprofit electric and water to the people through savings attendant to municipal ownership. By ordinance the Plant Board was then created.[1]

In 1946 the General Assembly of the Commonwealth enacted what is now KRS 96.172 through 96.188 inclusive, the provisions of which at that time were identical with the provisions of the 1943 City ordinance. Pursuant to this legislative enactment the City elected to operate its electric and water facilities under the pro-

[1] *Cawood* v. *Coleman*, Ky., 172 S.W. 2d 548 (1943)

visions of that statute, and thus the Electric and Water Plant Board of the City became a statutory instrumentality of the City rather than a mere agency created by ordinance.[2]

KRS 96.183 provides that the City may terminate the operation of its electric and water facilities by the Plant Board only by first adopting an ordinance directing that the sense of the voters of the City be taken and that after proper advertisement if two-thirds (⅔rds) of the voters of the City vote in favor of termination, then the City may rescind its election to operate under statute and by resolution may transfer the operation of the electric and water plant to the governing body of the municipality.

The Plant Board, although appointed by the Mayor with approval of the legislative body of the City, insures good business management of the facilities and is removed from direct political influence which has so often plagued other municipal utility ownership.

Immediately following World War II the use of electricity continued to grow at a compound rate so that the bonds issued by the City to acquire the facilities were retired in advance of their due date, and pursuant to KRS 96.182 excess revenues of the Plant Board were used to purchase bonds of the City for certain public projects from which all the people of Frankfort and vicinity have directly benefitted:[3]

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[2]*Settle* v. *Jones*, Ky., 206 S.W. 2d 59 (1947).

[3]*Perkins* v. *City of Frankfort, Ky.*, 276 S.W. 2d 449 (1955)

Consistent with its history of public service, the Plant Board pioneered in bringing cable television to the river valley in which Kentucky's capital city is located. RCA's pilot project with the Plant Board in 1952 was successful as set forth in the opinions of the court as shown below. In addition to using its utility poles to bring CATV to its users the Plant Board "induced by additional potential revenue that might be derived therefrom, determined to avail itself of the plan. However, it deemed it impracticable to engage in the actual operation and, for the attainment of this purpose and in order to take care of the maintenance problem and the management details, caused to create a self-perpetuating, non-profit corporation, known as Community Service, Inc." See *Consolidated Television Service, Inc.* v. *Leary,* Ky., 382 S.W. 2d 78 (1964) at 79.

In view of the success of the Plant Board together with the unprecedented growth of the use of electricity in the years immediately following World War II, it was natural that the Plant Board saw in cable television a two-fold opportunity for the people of Frankfort; first, low cost, non-profit cable television would be made available to consumers and secondly, the use of electricity required to activate television sets and to operate the cable system and its amplifiers, would contribute significantly to the growth of the use of electricity in the community, thus helping keep low electric rates.

Feeling it was best at that time for the operation and maintenance of the City's cable television system to repose in an agent of the Plant Board rather than the Plant Board itself, the Plant Board caused to be created a non-profit, non-stock corporation for the purpose of bringing low cost, non-profit television to the people of Frankfort and its environs, patterned somewhat after the successful manner in which electricity and water had been brought to the same people by the City through its statutory agent, the Plant Board. Such plan would increase the use of electricity and enhance the revenues of the Plant Board and extend the concept of municipal ownership and control to cable television strung upon the poles of the City along the city streets.

Beginning in 1952 the Plant Board contracted with Community to operate the City's CATV system on a low cost non-profit basis reciting that "the installation of a television distribution system in the City would produce substantial increase in the use of electric energy and its revenues". The thrust of the 1952 contract and the later contracts was to benefit the consumers or users of the City owned CATV system in the same manner as they have benefitted from the operation of the City owned electric and water facilities by the Plant Board.

Thus, the City, its statutory instrumentality the Plant Board, and Community Service effectively constituted a single entity for the ownership and operation of the City's television cable system. Indeed Con-

solidated precisely alleged this in its first suit in federal court. See *Consolidated TV Cable Service, Inc.* v. *City of Frankfort,* 465 F. 2d 1190 at 1191, footnote, number 2, which recites: "The Complaint avers that Community since 1967 has been under the control of the Plant Board and is an agency of the Plant Board. The opinion of the District Judge refers to Community, and the City of Frankfort and the Plant Board as the 'City'. It seems to be undisputed that the actions of Community referred to in this opinion, in substance and practical effect, are the acts of the municipal corporation, the City of Frankfort."

REASONS FOR DENYING THE WRIT

I

The Sixth Circuit Correctly Held in Harmony with Prior Decisions of This Court That State Action Immunity Shields Municipal Actors From Anti-Trust Attack Where Such Entities Have Acted Pursuant to "Clearly Articulated and Affirmatively Expressed State Policy" to Displace Competition with Monopoly Public Service.

The right of a Kentucky city to grant a franchise and to make available public service to its inhabitants is found in Section 163 and 164 of Kentucky's Constitution. In *Ray* v. *City of Owensboro,* Ky., 415 S.W. 2d 77 (1967) Kentucky's highest court held:

> The purpose of the section (Sec. 163) was to give the city control of the streets, alleys and public grounds and to make it possible for the city to provide the services of these utilities to its inhabitants. Therefore, the right granted is not and properly should not be restricted to those

> utilities enumerated, but *applies to all utilities and services which might today be proper subjects for control, when the original intent and purpose of the act is considered.* 415 S.W. 2d 77, 79 (emphasis ours)

The Supreme Court of Kentucky has squarely held that these provisions of Kentucky's Constitution encompass cable television service. *City of Owensboro* v. *Top Vision Cable Co.,* Ky., 487 S.W. 2d 283, 287 (1972). Cert. denied, 411 U.S. 948, 36 L. Ed. 2d 410, 93 S. Ct. 1926.

With the power to franchise cable television delegated to cities in Kentucky, Frankfort, under KRS 96.010 (2), may itself render the required service and is not required to sell any franchise. State policy in Kentucky clearly permits displacement of competition with either regulation or monopoly public service.

In *Hopkinsville Cable TV* v. *Pennyroyal Cablevision, Inc.,* 562 F. Supp. 543 (1982) the United States District Court for the Western District of Kentucky held that the acts of the city and its agents in awarding an exclusive franchise to Pennyroyal fell within the ambit of immunity from Sherman Act liability enunciated in *Parker* v. *Brown,* 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943).

Direct and clear action by Kentucky with respect to CATV was squarely held in *Pennyroyal, supra,* where the court said:

> . . . the Commonwealth of Kentucky clearly directed and authorized City to take the actions

> which are the subject of Hopkinsville Cable's antitrust claims. Kentucky is not neutral concerning cable television franchises. Kentucky's highest appellate court has ruled that cable television systems fall within Section 163 of the Kentucky Constitution. *City of Owensboro* v. *Top Vision Cable Co.,* 487 S.W. 2d 283, 287 (Ky. 1972). Section 163 grants municipalities the authority and responsibility to control the entry of public utilities into the municipal marketplace by requiring such utilities to obtain a franchise before they can operate within a municipality. *Thus, the Commonwealth of Kentucky grants City the same authority to create a monopoly for a provider of cable television as for a provider of electricity.* Clearly, the actions of City, about which Hopkinsville Cable complains, were "municipal conduct engaged in 'pursuant to state policy to displace competition with regulation or monopoly public service' ". Therefore, Parker shields the actions of City and its agents . . . from antitrust liability. 562 F. Supp. 543, 546. (emphasis ours)

The Sixth Circuit has previously relied on the interpretation of state law by the courts of that state in concluding that a municipal actor is entitled to state action immunity from antitrust allegations. See *City of North Olmstead* v. *Greater Cleveland Regional Transit Authority,* 722 F. 2d 1284 (6th Cir. 1983) Cert. denied 476 U.S. 1205 (1984).

Immunity from antitrust attack upon the respondents is in harmony with the decision of the Ninth Circuit in *Preferred Communications* v. *City of Los Angeles,* Cal. 754 F. 2d 1936 (1985) which held that a political

subdivision is *not* required to be "able to point to a specific detailed legislative authorization before it may properly assert a Parker defense in antitrust suit". As the court said:

> Were it otherwise, the specter of antitrust liability would unduly hamper the state's ability to allocate governmental authority between itself and its subdivisions. Restricted too would be its use of municipalities to regulate areas requiring flexibility and the exercise of wide discretion at the local level. 754 F. 2d 1396, 1414

The Ninth Circuit affirmed dismissal of the antitrust claims but reversed as to First Amendment claim. In dismissing the antitrust claims it was emphasized that state action is immune from the antitrust laws because the state itself has decided to act. 754 F. 2d 1936, 1415.[4]

The Sixth Circuit clearly followed the decision of this Court in *Town of Hallie* v. *City of Eau Claire,* 471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713. To prove "that a state policy to displace competition exists, the municipality need not 'be able to point to a specific detailed legislative authorization' in order to assert a successful Parker defense to an antitrust suit". 471 U.S. 39, 85 L. Ed. 2d 24, 29, 105 S. Ct. at 1718. "Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated

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[4]This Court granted certiorari only with respect to the First Amendment claim (See *Los Angeles* v. *Preferred Communication,* 476 U.S. 488, 490, 90 L. Ed. 2d 480, 485; 106 S. Ct. 2034, 2036).

function". 471 U.S. at 47, 85 L. Ed. 2d at 34, 105 S. Ct. at 1721.

The Writ should be denied because the decision of the Sixth Circuit is strongly supported by recent prior decision of this Court dealing with state action immunity of municipal actors from the Sherman Act liability under *Parker* v. *Brown, supra,* and its progeny.

II

The Sixth Circuit Correctly Held in Harmony with Prior Decisions That Under Kentucky Constitutional and Statutory Provisions the Respondents are Municipal Actors Whose Manner of Providing CATV Services to Residents of Frankfort Is a Reasonably Foreseeable Exercise of Delegated Powers Thus Shielding Respondents from Antitrust Allegations.

The Sixth Circuit correctly held that there exists under Kentucky law a "clearly articulated and affirmatively expressed" state policy to allow municipal regulation or the providing of CATV service, and foreseeably, to displace competition. Unlike the neutral provision of the Home Rule statute considered in *Community Communications Co.* v. *Boulder,* 455 U.S. 40, Kentucky law, as found in its Constitution and statutes, and as interpreted by its court of last resort, is not neutral but clearly contemplates the type of anticompetitive conduct alleged by petitioner.

KRS 96.010 (2) dispenses with the need to issue a franchise "if . . . the city owns or desires to own and operate a municipal plant to render the required service . . ." Anticompetitive conduct is immune so long as it is "a reasonably foreseeable exercise of de-

lated powers". In *Hybud Equipment Corp.* v. *City of Akron, Ohio,* 742 F. 2d 949 (1984), cert. denied, 471 U.S. 1004 (1985), the Sixth Circuit held that "if the challenged restraints are reasonably related to an agency's express powers and reasonably designed to promote the state aims within a designated field of regulation they can be found to result from a 'clearly and affirmatively expressed state policy' to displace competition" (742 F. 2d at 960).

Kentucky's policy of allowing municipal ownership is clearly articulated and affirmatively expressed. Low cost nonprofit service resulting from municipal ownership benefits the users. The lowest CATV rates consistent with sound management is not predatory pricing but public service. Frankfort is not required to franchise for profit CATV thus insuring higher rates.

As this Court observed in *Hoover* v. *Ronwin,* 466 U.S. 558, 574, 80 L. Ed. 2d 590, 603, 104 S. Ct. 1989, "the reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act. The Court did not suggest in Parker, nor has it suggested since, that a state action is exempt . . . only if the sovereign acted wisely . . .".

The Sixth Circuit correctly held that state action immunity should not be denied because the respondents alleged actions represent a misapplication of state law. Errors in the administration of powers conferred by the state should be left to state tribunals to control. *Llewellyn* v. *Crothers,* 765 F. 2d 769 (9th Cir. 1985).

Boone v. *Redevelopment Agency of San Jose,* 841 F. 2d 886 (9th Cir. 1988).

The respondents authority to own and operate municipal CATV was settled in *Norrell* v. *Electric and Water Plant Board,* Ky. App. 557 S.W. 2d 900 (1977). As the Sixth Circuit held whether the state authorized provision of CATV precisely as the arrangement among the respondents contemplates is better left to the determination of state courts. See *Consolidated Television Cable Services, Inc.* v. *City of Frankfort,* 465 F. 2d 1190 (6th Cir. 1972). The Sixth Circuit's holding that the respondents manner of providing CATV services to users in Frankfort and vicinity is reasonably foreseeable is in accordance with prior federal decisions. Such holding being in accordance with prior applicable decisions herein cited, the writ sought by petitioner ought to be denied.

III

In Accordance with Prior Decisions of this Court the Sixth Circuit correctly Held That Petitioner's Constitutional Claims under 42 U.S.C. §1983 are Barred by Res Judicata Under Prior State and Federal Decisions Where Such Claims Might Have Been Asserted But Were Not Asserted in Such Earlier Actions.

The Sixth Circuit focused upon two earlier cases: *Consolidated Television Service, Inc.* v. *Leary,* 382 S.W. 2d 78 (Ky. 1964) and *Consolidated Television Service* v. *City of Frankfort,* 465 F. 2d 1190 (6th Cir. 1972) and correctly concluded that petitioner's constitutional claims under 42 U.S.C. 1983 could have

been presented in those earlier actions but were not and hence are now barred by res judicata.

In *Leary, supra,* petitioner objected to the City's denying it the right to use city poles. Kentucky's then highest court affirmed dismissal and said in pertinent part:

> Under the facts recited, and the principles of law applicable thereto, we believe the Board's refusal to grant appellant (petitioner here) the right to use its poles did not necessarily result in unconstitutional discrimination. 382 S.W. 2d 78, 81.

In *City of Frankfort, supra,* petitioner in 1971 sued the respondents alleging unconstitutional impairment of contract, and violation of the due process and equal protection clauses of the Fourteenth Amendment. The Sixth Circuit affirmed dismissal by the District Court saying "the city's operation of its own CATV system does not violate any rights of Consolidated protected by the Constitution of the United States". 465 F. 2d at 1193

The preclusive effect of a prior state court judgment is determined by looking to the law of that state. *Kremer* v. *Chemical Construction Corp.,* 456 U.S. 461, 72 L. Ed. 2d 262, 102 S. Ct. 1883, and *Migra* v. *Warren County School Dist. Bd. of Ed.,* 465 U.S. 75, 79 L. Ed. 2d 56, 104 S. Ct. 892. In *Migra* this Court remanded to District Court for application of the state preclusion law of Ohio. Hence, the Sixth Circuit in harmony with the foregoing decisions gave *Leary, supra,* the

same preclusive effect in the federal courts as it would have in Kentucky courts.

In *Newman* v. *Newman*, 451 S.W. 2d 417, 419, Kentucky held "it has long been recognized that a party may not split his cause of action, therefore, if a cause of action should have been presented and the party failed to do so and the matter should again arise in another action, it will be held that the first action was res judicata as to all causes that should have properly been presented . . ." 451 S.W. 2d at 419.

The Sixth Circuit correctly held that the scope of a prior federal court judgment is governed by federal law. *Cemer* v. *Marathon Oil Co.*, 583 F. 2d 830 (6th Cir. 1978). This holding accords with the decision of this Court in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424, where this Court said:

> A final Judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action (citations omitted). Nor are the res judicata consequences of a final, unappealed judgment on the merits, altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case (citations omitted). 452 U.S. at 398, 69 L. Ed. 2d at 108.

The Sixth Circuit correctly applied the decisions of this Court to petitioner's raising for the first time a First Amendment claim together with its Fifth and

Fourteenth Amendment Claims, albeit in a slightly different form, by holding that these claims should have been raised litigation in the two suits in federal and state court.

The Sixth Circuit properly rejected petitioner's claim that it could not have brought its § 1983 claims until this Court's 1978 decision in *Monell* v. *Department of Social Services,* (436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018) that municipalities were amenable to suit under § 1983.

In *Harrington* v. *Vandalia-Butler Board of Education,* 649 F. 2d 434 (6th Cir. 1981) a similar argument was rejected and res judicata applied. In 1960 and 1971 Section 1983 was not unavailable to petitioner. It was free to challenge *Monroe* v. *Pape* (365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473) to the extent that it exempted municipalities from the ambit of § 1983.

The Sixth Circuit Observed as Follows:

> The circumstances between the parties have not really changed over the past 35 years. Consolidated keeps asking for a contract to use the Board's poles and, except for the 1959-1965 contract, the Board has consistently rebuffed Consolidated. Two Courts have looked at this matter, and have concluded there is no denial of constitutional rights. At some point, litigation must come to an end. Therefore, Judge Bertlesman's ruling that Consolidated's § 1983 action is res judicata is affirmed. 857 F. 2d at 358

The holding that petitioner's constitutional claims under 42 U.S.C. § 1983 are barred by res judicata is the uncontradicted holding of this Court in *Kremer, supra, Migra, supra,* and *Moitie, supra,* and other decisions herein cited. These decisions are ample reason for the denial of the writ sought by petitioner.

CONCLUSION

The Sixth Circuit followed the most recent decisions of this Court in deciding the questions presented. Its decision is in accord with such prior decisions of this Court. There is no conflict between the 6th Circuit decision and those of other Circuits where such questions have been raised. No reason exists for granting the writ, and the same ought to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles Lee Hobson, a member of the Bar of this Court, hereby certify that on this the 23rd day of February, 1989, three (3) copies of the Brief in Opposition from the Respondent, Electric and Water Plant Board of the City of Frankfort, Kentucky, in the above entitled case, were mailed, first class postage, prepaid, to:

Mr. Joseph E. Stopher, Mr. Raymond G. Smith, and Mr. Edward H. Stopher, Boehl Stopher Graves & Deindoerfer, Suite 2300, One Riverfront Plaza, Louisville, Kentucky 40202, Counsel for Petitioner; and to

Mr. Sheryl G. Snyder, Ms. Virginia H. Snell, and Mr. William H. Hollander, Wyatt, Tarrant & Combs, 2800 Citizens Plaza, Louisville, Kentucky 40202, Counsel for Respondents, the City of Frankfort, Kentucky, and Community Service, Inc.; and to:

Mr. Allen Prewitt, Prewitt & Prewitt, 311 Wilkinson Street, Frankfort, Kentucky 40601, Counsel for Respondent, City of Frankfort, Kentucky.

I further certify that all parties required to be served have been served.

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